SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

August 19, 2005

Via E-mail (bmoo461@ecy.wa.gov**)**
Bill Moore
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Puget Soundkeeper Alliance's Comments on Preliminary Draft Municipal Stormwater General Permits

Dear Bill:

Thank you for the opportunity to provide comments on Ecology's draft Phase I and Phase II municipal stormwater general permits. These comments are submitted on behalf of the Puget Soundkeeper Alliance.

Compliance with Water Quality Standards

Neither the proposed draft Phase I or Phase II permit requires meaningful compliance with water quality standards. State law mandates that these permits prohibit discharges that cause or contribute to violations of water quality standards, and Ecology should change the permits to comply with these requirements.

RCW 90.48.520 sets a standard for permits: "In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria." State NPDES and general permit regulations require permits, "whenever applicable," to include "limitations or requirements" necessary to "meet water quality standards." WAC 173-226-070(3)(a); WAC 173-220-130(1)(b)(i). RCW 90.48.520 admits of no exception and makes compliance with water quality standards "applicable" to these general permits. WAC 173-201A-040(1), -070(1), and -160(3) all also require compliance with water quality standards.

The Phase I and II permits include identical language about compliance with standards in Condition S5. S5.A. provides that the permits do "not authorize a violation" of water quality standards, sediment standards, or national Toxics Rule criteria. This is not a meaningful or enforceable permit condition, as "not authorizing a violation" may not be interpreted as equivalent to prohibiting discharges that cause or contribute to

violations. The permits should include language to effectively prohibit discharges that cause or contribute to violations of water quality and sediment standards.

Condition S5.B. could be construed as a compliance schedule for attainment of water quality standards compliance, but it would plainly not meet the regulatory requirements for compliance schedules, e.g., no compliance date, milestones, reporting, found in the state and federal regulations. Furthermore, Condition S7.B. of both permits, describing stormwater management programs, indicates that the design standard for such programs is "to reduce the discharge of pollutants … to the MEP and protect water quality." "Protect water quality" does not equal "ensure compliance with water quality standards."

Condition S5.C. purports to require "all new stormwater discharges" to "comply with all applicable surface water, groundwater and sediment management standards," but it does not effectively do this. It specifies that such compliance is to be determined on the basis of a permittee's satisfaction of technology standards, continuing Ecology's attempts to conflate technology-based and water quality-based limitations. It does provide that "site-specific information" can be used to show that the new discharge violates water quality standards despite the implementation-of-technology test, but the site-specific information analysis is limited to the time period "prior to authorization of a new stormwater discharge," which seems patently absurd as a means to ensure actual compliance with water quality standards. Compliance with water quality standards is about the actual quality of the water discharged and its actual effects on the receiving water, not about the technological means employed to treat or control pollution.

Beneficial uses, including salmonid spawning, rearing, and migrating, are part of the water quality standards. By authorizing discharges that may interfere with the life cycle of threatened or endangered salmonids, Ecology is potentially liable for illegal take under the Endangered Species Act.

As a practical matter, permit requirements effectively ensuring compliance with water quality standards are very important to PSA and to the public. The inclusion in the permits of meaningful requirements to ensure compliance with water quality standards, even if a simple narrative statement prohibiting discharges that cause or contribute to violations of water quality standards, would enable concerned citizens to seek redress for serious deleterious impacts of stormwater discharges on a particular waterbody to force improvements in discharge quality and stormwater management. The protection of water quality is, after all, the objective of the National Pollutant Discharge Elimination System and state water quality law. It is absurd to issue these permits without effective provisions to ensure achievement of this goal.

Prescriptive Requirements for Stormwater Management Programs

In its review of EPA's Phase II regulations, the Ninth Circuit Court of Appeals held that municipal stormwater dischargers' stormwater management programs must be reviewed by permitting agencies. *Environmental Defense Center v. EPA*, 344 F.3d 832,

856 (9th Cir. 2003) ("… stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharges of pollutants to the maximum extent practicable.") The proposed permits provide for no such review, presumably in recognition of Ecology's limited resources. PSA may be willing to accept a permit scheme that does not include Ecology review of all stormwater management programs if the permits are sufficiently prescriptive and detailed to provide adequate assurance that compliant stormwater management programs represent control to the maximum extent practicable.

Status of Co-permittees and Secondary Permittees

Both permits characterize the owners/operators of "regulated small municipal separate storm sewer systems which [are] not Permittees or Co-permittees" as "Secondary Permittees." S1.D. It is not at all clear what the regulatory status under these permits would be for Secondary Permittees, or, for that matter, for Co-permittees. Are such entities permit holders responsible, and potentially liable, for compliance with permit conditions?

Regulation of Discharges to Groundwater

Condition S2.A.3. of both permits purports to exempt from permit coverage "stormwater discharges to ground waters of the state that discharge through facilities regulated under the Underground Injection Control (UIC) program." Although the Ninth Circuit Court of Appeals has not yet reached the question, its district courts have tended to conclude that discharges to groundwater that is "hydrologically connected" to navigable waters are within CWA jurisdiction. Whether or not discharges to groundwater are regulated under the UIC program, the permits would illegally omit them from regulation if such groundwater is hydrologically connected to navigable waters.

Condition S2.A.4. of both permits asserts that "discharges to ground waters not in hydraulic continuity with surface water are covered only under state authorities …." This appears to be an attempt to take some discharges to groundwater out of the realm of potential citizen suit enforcement when there are permit violations concerning them. Puget Soundkeeper Alliance emphatically objects to this approach that would limit permittee accountability, as well as the rights of citizens, and provide cover for dischargers who violate the law. There are two legal problems with this: 1) These are NPDES permits and all conditions of NPDES permits are enforceable via citizen suits. If Ecology wants to have discharges to groundwater regulated only under state waste discharge permit authority, it has to issue a separate permit for that and leave the discharges to groundwater out of the NPDES permits. 2) "Hydraulic continuity" may be more restrictive and narrow than the "hydrologically connected" test courts apply to determine CWA jurisdiction. What does "hydraulic continuity" mean? Is it different than "hydrologic connection"?

Responsibility Despite Delegation

Puget Soundkeeper Alliance is pleased to see that Condition S3.B. of both permits clarifies that permittees remain liable for permit compliance even when they are relying on co-permittees or secondary permittees to perform required tasks. This provision is important to ensure compliance accountability and to minimize counterproductive finger-pointing.

Permit Modification for Changed Responsibility Arrangements

S3.B.2. of the Phase I permit would allow permittees to amend their NOI during the permit term to establish, terminate, or amend shared responsibility arrangements. This kind of change seems to be a major permit modification for which permit modification procedures (notice, comment, opportunity to appeal) are required, but the permit does not provide for these.

Timelines

Many of the deadlines in the Phase I permit seem pretty long given the comparable requirements of the 1995 permit and the very advance notice provided by this preliminary draft. These include: 2 years, 30 months, and 36 months for submission, adoption, and implementation of monitoring plans (S6.A.4.); the same for BMP effectiveness monitoring programs (S6.B.2.); one year for submission of legal counsel statement of legal authority when legal authority must be in place on the effective date (and under the 1995 permit) (S7.C.1.); 2 years for mapping of outfalls (required to be done under the 1995 permit) (S7.C.2.a.); 1 year for adoption of Stormwater Management Manual for Western Washington-equivalent standards for development/redevelopment/construction runoff controls (required to be done under the 1995 permit) (S7.C.5.b.v.). These also violate Ecology's regulation on compliance schedules because there are no interim dates and accompanying reporting requirements. WAC 173-226-160. Provision of additional time for completion of tasks already required to have been completed under the 1995 permit may also violate the Clean Water Act's antibacksliding prohibition.

Why are Ports allowed 18 months from permit issuance to develop SWPPPs for areas of existing development under the Phase I permit, 18 months for preparation of BMP maintenance manuals, and 18 months to provide relevant employees with educational materials? (S8.D.2.a., S8.D.3.a., and S8.D.4.a.) These are items that responsible government agencies should have had some time ago. The message from this kind of timeline at this late date is that stormwater control is not important. This is unacceptable.

The Phase II permit deadlines are outrageously excessive and lengthy, particularly given that this permit will be issued at least three years late and that the permittees have had ample notice of forthcoming permit requirements. This permit does not require stormwater management programs to be fully developed and implemented until the

expiration date of the permit. (S7.A.2.) Not only is this too long, but it potentially makes the requirement to have a stormwater management program unenforceable because it need not be implemented until the permit is, potentially, no longer in effect. The proposed draft Phase I permit illustrates Ecology's tendency to allow more time in successor permits for requirements that were to be completed under a previous permit. The purpose of the permit is to have small MS4s develop and implement stormwater management programs, not to further postpone what should have been done years ago. Another example is the four years provided for development of a monitoring program. Why should development of monitoring programs take four years? Phase II permittees should be required to do actual monitoring during the permit term both to compliment the monitoring information to be developed by Phase I permittees who share the Phase II permittees' watersheds, and so that Ecology can have the monitoring information to assist the development of the successor Phase II permit for issuance in five years. The Phase II timelines also violate Ecology's regulation on compliance schedules because there are no interim dates and accompanying reporting requirements. WAC 173-226-160.

Furthermore, there are at least two municipalities regulated under Phase II that have populations of 100,000 or more. These are Vancouver and Bellevue. Section 402(p) of the Clean Water Act requires permits for MS4s serving 100,000 or more to require compliance with standards "as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit." 33 U.S.C. § 1342(p)(4)(B). Unlike EPA's regulations, the statute does not tie the population threshold to any particular decennial census. Thus, the compliance timelines extending beyond three years are illegal for MS4s serving 100,000 persons or more.

Monitoring

Outfall sampling for metals (copper, lead, and/or zinc) is a glaring omission from Phase I monitoring program requirements (S6.A.4.c.iv.). These are typical problem pollutants from municipal stormwater discharges that should be evaluated for compliance with water quality standards and for program effectiveness.

PSA encourages Ecology to build up expertise to review and provide additional guidance for monitoring programs. PSA also believes that the permits should include very detailed criteria for monitoring programs in the permit. We view this as the best means to get consistent meaningful data to answer the monitoring objective questions.

PSA is glad to see requirements for both outfall and receiving waters in the permit, as these are necessary to evaluate the effectiveness of management programs as well as the discharge impacts on water quality. PSA strongly urges Ecology to include BMP effectiveness monitoring among the permits' requirements as well.

Recent reports indicate that polycyclic aromatic hydrocarbons from cars and roads are pollutants of increasing concern for the Puget Sound. PSA urges that PAHs be included among the pollutants for which monitoring is required.

To the extent not inconsistent with the comments given here, PSA supports the comments on monitoring provided by the Puget Sound Action Team.

Inspection Program Requirements

In several places both permits set out detailed standards for various types of inspection programs, including when sites need to be inspected and what needs to be inspected, as well as prescribed responses to inspection findings, including development/redevopement/construction projects (Phase I – S7.C.5.b.vii.; Phase II – S7.C.4.b.); stormwater facilities maintained by permittee (P.I - S7.C.9.b.ii.; P.II – S7.C.5.); stormwater facilities regulated by permittee (P.I - S7.C.9.b.iii.; P.II – S7.C.4.c.). However, for these requirements there is a statement that compliance with them "shall be determined by the presence of an established inspection program designed to inspect all sites." In other words, the permit says that permittees have to do specified things with inspections and responses to inspection findings, but then indicates that compliance with such requirements is determined only by looking at whether the permittee has an inspection program. This appears to contradict the requirement of WAC 173-226-080(1)(a) that all discharges are to be "consistent with the terms and conditions of the permit." It would also make it impossible to enforce the detailed standards, rendering them a nullity. This approach unacceptably minimizes permittee accountability for the important requirements for permittee inspection and enforcement programs.

Illicit Discharges

The Phase I permit would allow screening for illicit discharges to be conducted using any of two specified methods or "other alternative methods that have been approved by Ecology." S7.C.8.b.vii. Such other alternative methods and the standards for Ecology approval are not identified. NPDES permits must spell out their conditions so that permittees can comply with them and be held accountable for doing so. In addition, Ecology's post-permit approval of alternative methods would effectively change the permit requirements and should be subject to permit modification procedures.

Both permits (P.I. at S7.C.8.a.i.; P.II. at S7.C.3.b.i.) require permittees to prohibit non-stormwater discharges except that specified categories of non-stormwater discharges must "be addressed only if identified as a significant contributor [or, for Phase I, 'a contributor'] of pollution" to the MS4. This is unacceptably vague. What is "a contributor" and "a significant contributor"? On what basis is this determination to be made? By whom is this determination to be made?

Both permits would exempt "rising ground waters" from the prohibition on illicit discharges. (P.I at Appendix 4; P.II at S7.A.3.b.i.) Rising ground waters may be contaminated with serious non-stormwater pollutants, including septic system pollutants and contaminants from other sources. Septic system contamination of ground waters is a very significant issue in Vancouver, for example. This is also contrary to the requirement of CWA Sec. 402(p)(3)(B)(ii) that the permits "effectively prohibit non-stormwater

discharges into the storm sewers," and should be changed to "uncontaminated rising ground waters."

Incorporation of the 2005 Stormwater Management Manual for Western Washington

In general, PSA is pleased that Ecology would incorporate and thereby prescribe key portions of its stormwater management manual into these permits by reproducing them in the Appendices 1. However, PSA shares the concerns that many have expressed about some of the 2005 modifications made to the Western Washington Manual. In particular, PSA shares the concerns expressed by the U.S. Fish and Wildlife Service and NOAA Fisheries in their joint December 23, 2004, comments on the 2005 manual revisions. Like the Services, PSA questions whether the changes to applicability criteria for the flow control standards (both for highly urbanized drainage basins and to exempt river reaches from flow control), the average annual daily traffic thresholds for advanced treatment, and the limitations on implementation of construction stormwater pollution prevention requirements are adequate in consideration of the needs of threatened and endangered salmonids. PSA further questions whether the Western Washington Manual continues to represent AKART, or MEP, after the 2005 amendment.

Phase II Regulatory Threshold

The Phase II permit increases the regulatory thresholds for the requirement for a permittee to control development/redevelopment/construction project stormwater discharges from that identified in Ecology's Stormwater Management Manual for Western Washington, and incorporated into the Phase I permit, to apply only when a land area of one acre or more is disturbed. (S7.A.4.) This does not satisfy either AKART or MEP standards. What makes it unreasonable or impracticable for Phase II permittees to regulate sites smaller than one acre when Phase I permittees must?

Municipally-owned Industrial Stormwater Discharges

Both permits assert coverage of stormwater discharges from permittee-owned "heavy equipment maintenance or storage yards" that are not covered under the Industrial Stormwater General Permit. (P.I at S7.C.9.b.ix.; P.II at S7.C.5.i.) If these discharges are "associated with industrial activity" as defined by EPA's regulations, then they must be conditioned to meet water quality standards to satisfy Clean Water Act requirements (i.e., they are industrial stormwater, not muni stormwater). Either coverage under the Industrial Stormwater General Permit must be required for these, or relevant requirements of the ISGP must be imported into these permits for these discharges.

Organizational Structure

It does not seem important to PSA that the Phase I and II permits have a consistent organizational structure. The two permits address distinct regulatory situations (the Phase I permit is for larger systems with already established programs) and the

priority in the development of the permits should be on sound regulation, protection of resources, and provisions for accountability, rather than a consistent organizational structure.

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By: s/Richard A. Smith
Richard A. Smith